

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 17, 1991 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 11, 1991, he sustained a lumbar injury when he fell while delivering mail. By decision dated September 11, 1992, OWCP accepted the claim for lumbar sprain and herniated disc at L5-S1. It subsequently expanded acceptance of the claim to include post laminectomy syndrome, lumbosacral radiculopathy, lumbar sprain, and intervertebral disc disorder with myelopathy L5-S1.

Appellant stopped work on January 13, 1991 and returned on February 5, 1991, after receiving continuation of pay. He stopped work again and underwent an L5-S1 discectomy on May 5, 1992. Appellant was released to full duty on November 10, 1992 and received wage-loss compensation for intermittent time off through April 15, 1993.

Appellant stopped work on July 30, 1997 when he sustained a recurrence of disability. He did not return to work and received wage-loss compensation on the daily compensation rolls. On December 9, 1997 appellant underwent surgical decompression and spinal fusion. By letter dated February 23, 1998, OWCP informed him that he would receive wage-loss compensation on the periodic rolls every 28 days.

By letter dated May 14, 1998, the employing establishment reported that appellant's Federal Employees Health Benefits (FEHB) program was being transferred based on his retirement effective April 25, 1998.

In a May 20, 1998 Federal Employees' Group Life Insurance (FEGLI) Program form, appellant's retirement was certified under the Civil Service Retirement System (CSRS) Act/ Federal Employees Retirement System (FERS) Act. The date of retirement was noted as April 25, 1998 with a May 14, 1998 notice of conversion. The effective date of continuous coverage under the FEGLI program was noted as December 2, 1978 when appellant's coverage and employment began.

By letter dated July 6, 1998, the Office of Personnel Management (OPM) reported that appellant's civil service annuity payments were terminated effective November 30, 1997. This letter also related that no overpayment existed.

By letter dated November 24, 1998, OWCP informed appellant that under FECA, he was receiving a gross weekly compensation of \$531.68 and gross 28-day compensation of \$2,126.72. It informed him that he could also be entitled to receive benefits provided by OPM under the CSRS or FERS. OWCP provided him with an election benefits (Form CA-1105) and requested that he select either FECA benefits or retirement benefits as he was not entitled to receive FECA and CSRS/FERS benefits concurrently, except for a schedule award.

In a November 30, 1998 CA-1105 form, appellant elected to receive FECA benefits in preference to any benefits either under CSRS or FERS.

By letter dated April 1, 2010, OWCP notified appellant that he was approaching his 62nd birthday, the minimum age at which an individual is eligible to receive Social Security Administration (SSA) retirement benefits. It explained that if he had been approved for SSA

retirement benefits, or was currently receiving them, to contact the district Office immediately in order to make the necessary adjustments to his compensation benefits.

In a March 22, 2017 FERS/SSA dual benefits calculations worksheet, SSA reported that appellant was under FERS from January 11, 1991 through the present. It provided his SSA rate with FERS and SSA rate without FERS from June 2010 through December 2016.

By letter dated April 13, 2017, OWCP informed appellant that his current monthly benefit amount was \$817.30, but that SSA had determined that he would only be entitled to \$784.40 as his federal service increased his monthly Social Security payment by \$32.90. It noted that this difference of \$32.90 as the portion of Social Security benefits attributed to federal service and was the amount that must be offset against his compensation benefits. OWCP explained that since Social Security benefits were paid monthly (12 payments per year), and compensation benefits were paid every 28 days (13 payments per year), the monthly offset amount of \$32.90 would be adjusted to a 28-day payment cycle of \$30.37. Accordingly, the offset of appellant's compensation payments in the amount of \$30.37 would begin with his payment dated April 29, 2017 and his new net compensation would be \$2,646.73.

By notice dated April 18, 2017, OWCP made a preliminary determination that an overpayment of compensation in the amount of \$1,948.76 was created for the period June 1, 2010 through April 1, 2017 as appellant was paid dual compensation under FECA and SSA FERS retirement without an appropriate offset. It found that he was without fault in the creation of the overpayment. An OWCP memorandum noted that appellant received compensation payments for temporary total disability on the periodic rolls beginning June 16, 2002. SSA indicated that he was concurrently receiving FERS retirement benefits and SSA benefits from June 1, 2010 through April 1, 2017. OWCP noted that appellant was on the periodic rolls from June 1, 2010 through April 1, 2017 and explained that the portion of his Social Security benefits that he earned as a federal employee, as part of his FERS retirement, and the receipt of benefits under FECA he received concurrently for this period was a prohibited dual benefit. As compensation payments were not offset by the amount of Social Security benefits he received, attributable to his federal service, resulted in an overpayment of compensation.

A fiscal pay rate memorandum was provided which showed the SSA monthly compensation amounts with FERS and without FERS from June 1, 2010 through April 1, 2017. Appellant was informed of his options if he wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. If he wished a waiver of recovery of the overpayment, he was advised to submit financial information and a completed overpayment recovery questionnaire (OWCP-20) within 30 days.

In an April 24, 2017 CA-110 form telephone note, OWCP claims examiner noted that appellant called regarding his overpayment and reported that he retired under CSRS and not FERS. The claims examiner reported that he would need to contact the employing establishment which reported him as a FERS employee and provided him the contact information.

In an April 28, 2017 CA-110 form telephone note, appellant called after speaking with OPM and reported that he did not have any of his federal service under FERS as all of his employment was under CSRS.

By decision dated May 31, 2017, OWCP found that there was an overpayment of compensation in the amount of \$1,948.76 for the period June 1, 2010 through April 1, 2017 as appellant was paid dual compensation under FECA and SSA without an appropriate offset for FERS. It found that he was without fault in the creation of the overpayment because he had notified OWCP on his Form CA-1032 that he was concurrently receiving SSA and FECA benefits. OWCP determined that the overpayment was not subject to waiver of recovery because appellant did not respond to the preliminary overpayment determination. It found that he could repay the overpayment by submitting \$50.00 monthly based on the enclosed payment schedule.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.² Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”³

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service.⁴ If an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee’s federal service.⁵ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant’s benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. It will also provide a hypothetical SSA benefit computed without FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8116(d). *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee’s federal service. *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010).

obtain the amount of compensation payable.⁶ It does not require an election between FECA and SSA benefits, except when the SSA benefits are attributable to the employee's federal service.⁷

ANALYSIS

The Board finds that the case is not in posture for decision.⁸ With respect to the fact and amount of this claimed overpayment, OWCP based its overpayment determination on appellant having reportedly received SSA FERS age-related benefits for his federal service. Relying on information provided by the SSA, it found that he had been receiving a dual benefit dating back to June 1, 2010. Notwithstanding the information SSA provided on March 22, 2017, the record calls into question OWCP's determination that he was covered under FERS or received a dual benefit.⁹

The offset provision of 5 U.S.C. § 8116(d)(2) applies to Social Security old-age benefits that are attributable to federal service covered by FERS.¹⁰ However, the record suggests that appellant's federal civilian service would have been covered under FERS' predecessor, the CSRS. Based on the evidence of record, he began working for the Federal Government well in advance of the January 1, 1987 effective date of FERS.¹¹ The record establishes that his employment began on December 2, 1978. There is no evidence of record that appellant paid Social Security taxes OASDI as a federal civilian employee under FERS. Furthermore, there is no evidence that he either elected or was eligible to convert from CSRS to FERS.¹²

While SSA provided OWCP information concerning the amount of appellant's age-related benefits purportedly attributable to his FERS-based civilian service, given his pre-1987 employment history, OWCP should have further inquired regarding the accuracy of this information. Appellant called OWCP following the preliminary overpayment determination on April 24, 2017 and notified the claims examiner that his retirement was under CSRS and not FERS. He called again on April 28, 2017 reporting that he had spoken with OPM who confirmed that his retirement was under CSRS. OWCP's procedures provide that, if a possible dual benefit exists, OWCP should review the file carefully if the claimant is 62 years or older and is under FERS, because a FERS offset may be required.¹³ The procedures further note that

⁶ FECA Bulletin No. 97-0009 (issued February 3, 1997). Retirement benefits paid by OPM or SSA can be paid concurrently with a schedule award without any deduction from FECA benefits.

⁷ *Supra* note 5 at Chapter 2.1000.11(b) (February 1995).

⁸ *J.J.*, Docket No. 14-0785 (issued September 3, 2014).

⁹ *A.P.*, Docket No. 12-0122 (issued May 7, 2012).

¹⁰ Under CSRS, federal employees were generally exempt from paying Social Security taxes; Old-age, Survivors and Disability Insurance (OASDI). 5 U.S.C. §§ 8331-8351.

¹¹ 5 U.S.C. § 8402(b)(2)(B).

¹² *See id.* at § 8402.

¹³ *See supra* note 5, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2.812.9c (May 2012); FECA Procedure Manual, *id.* at *Dual Benefits*, Chapter 2.1000.4e (January 1997).

an offset is not required for CSRS benefits and if OWCP cannot determine what retirement system the claimant is under, “the [claims examiner] should send a letter to ... OPM to request information.”¹⁴ OWCP did not seek clarification from OPM.¹⁵ As noted, OWCP’s procedures places the responsibility on the claims examiner to carefully review the file in situations where a dual benefit might possibly occur, including the responsibility of contacting OPM to determine the applicable civil service retirement system.¹⁶

The Board finds that, in light of appellant’s pre-1987 federal employment history, the evidence does not establish that he was covered under FERS or received a dual benefit.¹⁷ OWCP did not thoroughly investigate whether appellant was covered under either CSRS, CSRS Interim/Offset,¹⁸ or FERS. The Board further notes that, while SSA provided data regarding various effective rates beginning June 1, 2010, it did not provide a complete payment history substantiating his receipt of SSA age-related benefits during the purported overpayment period of June 1, 2010 through April 1, 2017 nor did it explain why his FERS coverage began on January 11, 1991. Due to these deficiencies, the Board finds that the case is not in posture for decision.¹⁹

OWCP’s determination that appellant received a dual benefit and overpayment of compensation will be set aside. The case is remanded for further development.²⁰ Following such further development, after it has supplemented the case, OWCP shall issue a *de novo* decision.²¹

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant received an overpayment of compensation.

¹⁴ *Id.*

¹⁵ FECA Procedure Manual, *supra* note 5.

¹⁶ *Id.*

¹⁷ See *G.W.*, Docket No. 09-1211 (issued January 6, 2010) (the Board reversed OWCP’s finding of overpayment where the employment history indicated that the former employee was not likely covered under FERS and SSA had provided conflicting information regarding whether a FERS/SSA offset was required).

¹⁸ CSRS Interim/Offset was a precursor to FERS that required contributions to both CSRS and OASDI. It generally applied to certain new hires or former CSRS-covered employees who had been separated from service for at least one year and rehired after December 31, 1983.

¹⁹ *F.F.*, Docket No. 16-0063 (issued June 24, 2016).

²⁰ *J.M.*, Docket No. 12-0954 (issued November 26, 2012).

²¹ As the case is not in posture regarding the fact of overpayment, the issues of waiver and recovery are moot.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: December 22, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board